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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP 24 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

U S West Communications, Inc.

CC Docket No. 98-84

Ex Parte Submission Concerning
the Petition for Preemption, Declaratory Ruling
and Injunctive Relief Filed by
McLeodUSA Telecommunications Services, Inc.

**COMMENTS RESTATING SUPPORT OF THE PETITION OF
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.
FOR PREEMPTION, DECLARATORY RULING AND INJUNCTIVE RELIEF**

The Competitive Telecommunications Association ("CompTel"),¹ by its attorneys, hereby submits these comments in response to U S West Communications, Inc.'s ("U S West") *ex parte* submission in the above-captioned proceeding.² In that *ex parte* presentation, U S West informs the Commission of a recent Nebraska Supreme Court opinion rejecting an appeal by McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") and other competitive local exchange carriers to overturn the Nebraska Public Service ("Nebraska PSC") decision permitting U S West to withdraw Centrex services. U S West argues that, as a result of the Nebraska Supreme Court decision, further consideration by the Commission of

¹ CompTel is an industry association representing approximately 250 providers of competitive telecommunications services. Many CompTel members are competitive local exchange carriers who like McLeodUSA would be denied critical entry opportunities if Centrex is withdrawn.

² *Public Notice, Pleading Cycle Established for Comments on U S West's Ex Parte Submission Concerning the Petition for Preemption, Declaratory Ruling, and Injunctive Relief Filed by McLeodUSA Telecommunications Services, Inc.*, DA 98-1792, rel. September 3, 1998.

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McLeodUSA's petition for preemption, declaratory ruling and injunctive relief is unwarranted and would impose new standing rules on the Nebraska Supreme Court.

U S West's *ex parte* submission is a transparent attempt to divert the Commission's attention away from the substantive competition issues raised in the McLeodUSA preemption petition. U S West tries to recharacterize McLeodUSA's petition as a matter subject to state law and, therefore, moot as a result of the Nebraska Supreme Court decision. While McLeodUSA properly availed itself of remedies available under state law, the petition filed with the Commission clearly asks whether the decision by the Nebraska PSC permitting U S West to withdraw its Centrex service is a market barrier that the Commission is required to preempt pursuant to Section 253 of the Telecommunications Act of 1996 ("Telecommunications Act") -- an inquiry clearly governed by and subject to federal law.

Should the Commission grant U S West's request and dismiss McLeodUSA's petition on procedural grounds, McLeodUSA and other similarly situated carriers would have no alternative means of addressing the market exclusion caused by U S West's Centrex withdrawal. This result clearly violates Section 253 of the Telecommunications Act which not only prohibits local statutes, regulations or legal requirements that *may* prohibit or have the effect of prohibiting the ability of any entity to provide telecommunications services but also *requires* the Commission to preempt enforcement of any such requirements. Accordingly, CompTel urges the Commission to rebuff attempts by U S West to recharacterize the issues relevant to this proceeding and move rapidly to grant the relief requested by McLeodUSA in its petition.

I. THE DECISION BY THE NEBRASKA SUPREME COURT DISMISSING MCLEODUSA'S APPEAL ON PROCEDURAL GROUNDS CLEARLY UNDERSCORES THE NEED FOR RELIEF UNDER FEDERAL LAW

At the outset, CompTel wishes to emphasize that the Nebraska Supreme Court decision dismissing McLeod's appeal of the Nebraska PSC's decision approving U S West Centrex withdrawal in no way limits the Commission's ability to review implications of the state agency's decision under federal law. In fact, as noted by McLeodUSA in its response to U S West's *ex parte* presentation,³ the Nebraska Supreme Court's dismissal of McLeodUSA's appeal on procedural grounds increases the need for prompt Commission action in this matter. Significantly, in rejecting McLeodUSA's complaint and subsequent appeal, neither the Nebraska PSC nor the Nebraska Supreme Court examined the anticompetitive effect of U S West's Centrex withdrawal. And now, without substantive review, the issue has been deemed moot in both forums, thereby eliminating all remedies available to McLeodUSA and other similarly situated carriers under state statutory law.

Moreover, the Commission would abdicate its statutory responsibility under Section 253 were it to dismiss McLeodUSA's petition as requested by U S West. Carriers currently certified to provide service in Nebraska as well as those seeking to provide service in the state are severely hindered by the Nebraska PSC decision to allow U S West to withdraw Centrex services. As set forth in CompTel's initial comments and echoed by many commenters in this proceeding, the availability of resale as an entry strategy is integral to the development of competition in the local services market. Failure to recognize such will most surely result in

³ *Supplemental Response of McLeodUSA Telecommunications, Inc.*, filed August 27, 1998, at 1.

continuous barriers to competition in contravention of the Congress' pro-competition goals. Thus, it is incumbent upon the Commission to assume the role envisaged by Congress in enacting Section 253 and preempt the Nebraska PSC decision allowing U S West to withdraw its Centrex service. Anything short of complete preemption by this Commission will defeat the introduction of meaningful and widespread competition in the Nebraska local market.

II. THE COMMISSION MUST DISMISS THE ISSUES RAISED IN THE U S WEST EX PARTE SUBMISSION AS MERE ATTEMPTS TO DIVERT ATTENTION AWAY FROM THE LOCAL COMPETITION ISSUES RAISED IN MCLEODUSA'S PETITION

In its *Public Notice*, the Commission asks interested parties to comment and provide information in response to U S West's *ex parte* submission dated August 21, 1998. Specifically, the Commission requests responses to the following questions: (1) whether the Section 208 complaint filed with the Commission by Enhanced TeleManagement, Inc. ("ETI") provides an adequate alternative to the remedies sought in McLeodUSA's preemption petition; (2) whether a certified competitive local exchange carrier in Nebraska can now file a complaint challenging U S West's withdrawal of Centrex services; and (3) whether there exists any Nebraska law, order or "other legal requirement" within meaning of Section 253(a), the preemption of which would provide the same relief as requested in McLeodUSA's petition. For purposes of clarity, CompTel responds to each inquiry in the order posed.

A. The Commission Should Decide McLeodUSA's Petition on Its Merits

First, CompTel strongly encourages the Commission to decide the McLeodUSA petition on its merits and to do so expeditiously. In light of the preemption mandate of Section 253, CompTel does not believe that it is necessary to address whether the Section 208 complaint filed by Enhanced TeleManagement, Inc. provides an adequate alternative to the McLeodUSA

petition.⁴ Nonetheless, a Section 208 complaint such as the one filed by ETI is restrictive in that it is binding only upon the parties to the complaint. Thus, it would not sufficiently address or remedy the anticompetitive implications of U S West's Centrex withdrawal on the entire Nebraska market.

The Commission began accepting comments and information in response to the McLeodUSA preemption petition over two months ago and to date it already has collected two rounds of comments and *ex parte* submissions. Thus, the Commission and parties interested in this matter already have expended substantial time and resources addressing the issues raised by the McLeodUSA preemption petition. Moreover, as a result of these efforts, there is sufficient record evidence for the Commission to issue a final decision expeditiously.

Quite frankly, there is simply no reason to delay a decision in this matter. The issues to be addressed and remedies proposed are clear. Moreover, the issues central to the McLeodUSA petition involve barriers to entry which, in CompTel's view, necessitate a direct response by the Commission. When a state regulatory agency sanctions actions by an incumbent local exchange carriers that has the effect of impeding competition on the local level, the Commission must examine the competitive implications of that action and ensure full compliance with barrier to entry prohibitions embodied in Section 253. Thus, in light of the Commission's mandate under Section 253, CompTel strongly urges the Commission to move forward on this matter and render a decision on McLeodUSA's petition for preemption, declaratory ruling and injunctive relief without further delay.

⁴ By way of background, the ETI Section 208 complaint requests the following relief from the Commission: (1) adjudge and decree that U S West is in violation of or is threatening to violate Sections 202(a), 251(b)(1) and/or 251(c)(4) of the Communications Act; (2) award to ETI damages that it has or will sustain as a result of U S West's actions; and (3) assess, to the fullest extent permitted by law, forfeitures or penalties against U S West for each day it is in violation of Sections 202(a), 251(b)(1) and/or 251(c)(4).

B. There Are No Remaining Avenues to Challenge the Nebraska PSC Decision Permitting U S West to Withdraw Its Centrex Service Under Nebraska Law

This Commission is the last forum in which McLeodUSA can address the anticompetitive implications of U S West's Centrex withdrawal. As discussed earlier, the Nebraska Supreme Court already has denied McLeodUSA's appeal, citing to the appellant's lack of standing. Consistent with that decision, the Nebraska Supreme Court ordered the Nebraska PSC to vacate its order, essentially eradicating the Nebraska PSC review of McLeodUSA's complaint altogether. Unfortunately, because it is not a certified carrier under the Nebraska administrative rules, there are no remaining legal remedies available to McLeodUSA under state law.

Moreover, even if a party with "standing" (presumably one certified to provide service in Nebraska at the time U S West proposed to withdraw Centrex services), wanted to challenge the Nebraska PSC's decision, it would be barred by the time limitations incorporated in the statutes governing rate lists. In particular, Section 86-803(2) of the Nebraska Revised Statutes provides a range of 90 to 120 days from the date the rate change is filed in which parties may file a complaint with the Commission. Unfortunately, even under a best case scenario (*i.e.*, the 120 days window), no carrier is now eligible to file a complaint with the Nebraska PSC challenging U S West's Centrex withdrawal.

C. The Automatic Approval of U S West's Centrex Withdrawal Is A Legal Requirement Which May Be Reviewed Pursuant to Section 253

Finally, the dismissal of McLeodUSA's complaint by the Nebraska PSC and subsequently by the Nebraska Supreme Court is in effect the approval by both entities of U S West's proposal to withdraw its Centrex services as a matter of Nebraska state law. In raising this issue, CompTel assumes that the Commission is concerned about the legal status of the

Nebraska PSC order and whether there still exists a law or legal requirement to be challenged under Section 253. As discussed above, the Nebraska Supreme Court not only dismissed McLeodUSA's appeal for lack of standing but also ordered the Nebraska PSC to vacate its decision on the same grounds. Consequently, and at least technically, it appears that the legal action underlying McLeodUSA's claim no longer exists.

CompTel posits, however, that the legal requirement to be reviewed by the Commission pursuant to Section 253 remains the same. Under Nebraska law, once the Commission denies a complaint challenging the validity of an amendment to a rate list, the rate list automatically goes into effect without further action. As a result, the amended rate list becomes legally binding on U S West and its customers and is, therefore, a legal requirement under Section 253. Thus, although the Nebraska PSC order denying McLeodUSA's challenge has been vacated, the amended rate lists automatically becomes effective as a result of this Nebraska Supreme Court decision, is legally binding on U S West and its customers under Nebraska law and therefore, is subject to Commission review.

Finally, as a generally matter, whether there exists an actual order permitting U S West to withdraw its Centrex service is irrelevant. Nebraska law clearly permits U S West to withdraw services integral to the resale market. The fact that the Nebraska PSC can and does sanction such action is sufficient grounds for Commission review under Section 253.

III. CONCLUSION

For the reasons stated in McLeodUSA's petition and herein, CompTel submits that the FCC should grant the requested preemption, declaratory ruling and injunctive relief as expeditiously as possible.

Respectfully submitted.

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Dated: September 24, 1998

CERTIFICATE OF SERVICE

I, Clara C. Thomas, hereby certify that I have served copies of the foregoing "Comments Restating Support of the Petition of McLeodUSA Telecommunications, Inc. For Preemption, Declaratory Ruling and Injunctive Relief" this 24th day of September, 1998, upon the following parties via U.S. mail:


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